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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-922

CHRYSLER CORPORATION,

Petitioner,

vs.

HAROLD BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Motion of Federation of American Hospitals for Leave to File Brief Amicus Curiae.

and

Brief of Amicus Curiae Federation of American Hospitals.

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Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Motion of Federation of American Hospitals for Leave to File Brief Amicus Curiae.

Pursuant to Rule 42(3) of the Rules of this Court, the Federation of American Hospitals respectfully moves this Court for leave to file a brief amicus curiae in the above-entitled case. Counsel for Respondents have not consented to movant's filing; the Petitioner has granted its consent.

Interest of Federation of American Hospitals.

The Federation of American Hospitals ("FAH") is the national trade association representing the interests of investor-owned hospitals in the United States and its possessions. Ninety to ninety-five percent of the Federation's members participate in the Medicare program and are reimbursed, annually, for approximate-

ly one-fourth of their total patient revenues pursuant to this program. To participate in the Medicare program, each hospital must file with the Department of Health, Education and Welfare a detailed annual financial report.

The question presented in the instant case is a matter of significant importance to hospitals. The court below held that judicial review of agency decisions to release confidential business information is limited to a review of the administrative record. With respect to release of Medicare cost reports there can be no meaningful agency review and there may be no judicial review whatsoever.

As far as is known to FAH, no other amicus has addressed the impact of the decision below on hospitals and other submitters of confidential business information which are afforded no adequate agency and court review. For these reasons, FAH requests this opportunity to present its views to this Court.

Conclusion.

For the above stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

WEISSBURG AND ARONSON, INC.,
By ROBERT A. KLEIN,
DAVID REPLOGLE,
Attorneys for the Federation of American Hospitals.

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On Writ of Certiorari to the Court of Appeals for the Third Circuit.

Brief of Amicus Curiae Federation of American Hospitals.

I.
Opinions Below.

The opinion of the court of appeals is reprinted as Appendix A to the Petition for Writ of Certiorari and is reported at 565 F.2d 1172. The opinion of the district court is reprinted as Appendix B to the Petition for Writ of Certiorari and is reported at 412 F. Supp. 171.

II.
Jurisdiction.

The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

III.
Amicus Curiae.

The Federation of American Hospitals ("FAH"), a nonprofit corporation organized under the laws of the State of New York, is the national trade association representing the interests of investor-owned hospitals in the United States and its possessions. FAH is the recognized spokesman for approximately 1,054 such hospitals. Ninety to ninety-five percent of the investor-owned hospitals in the United States are certified for participation in the Medicare program.[1] Many of the hospitals are owned by multifacility publicly owned companies, some of which also own skilled nursing facilities which participate in the Medicare program. In addition, most of the publicly owned companies provide management, consultation and technical services to many hospitals of all types of sponsorship throughout the United States which also participate in the Medicare program. The hospitals which participate in the program are reimbursed, annually, for one-fourth of their total patient revenues pursuant to this program.[2]

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[1]In 1974 there were 7,174 hospitals in the United States. *Hospital Statistics* (1975 ed.), American Hospital Association, at viii and 10. According to Social Security Administration statistics, there were 6,733 hospitals certified for participation in the Medicare Program in 1974. *Health Insurance Statistics* HI-74 September 8, 1976. The number of Medicare-certified hospitals represents 93.85% of the number of hospitals identified by the AHA.

[2]In fiscal year 1977 total national inpatient and outpatient hospital expenditures were $65,627,000,000. Of that amount Medicare paid $15,520,000,000, or 23.6%. In the same year the Medicaid program, a joint federal-state program providing medical services to the medically indigent with cost reimbursement procedures similar to those of Medicare, paid $5,964,000,000 of total hospital expenditures. Thus, government medical reimbursement accounted for 32.7% of total U.S. hospital expenditures in 1977. *Health Notes,* Health Care Financing Administration, May 1978.

Each hospital participating in the Medicare program is required to file a "cost report" setting forth the basis of its claims for reimbursement. 42 C.F.R. 405.406 and 405.453(f). Cost reports contain confidential financial and statistical data of a hospital which are generally not released to the public.

FAH, as amicus, does not intend to repeat the arguments of Petitioner and other amici presented to the Court, nor will it seek to identify in detail the adverse effects of releasing Medicare cost reports. This brief is presented to establish one point only: contrary to the conclusions of the court below requiring the administrative agency first to determine questions concerning the release of confidential business information, with limited review of such determinations, there can be no adequate agency review and there may be no judicial review with respect to releasing Medicare cost reports.

IV.
Summary of Argument.

The decision below—that judicial review is limited to a review of the administrative record—rests in part on the assumption that the release of confidential financial information is subject to adequate agency and court review. However, decisions to release Medicare cost reports cannot be subject to adequate agency review. Moreover, according to the government, agency decisions such as whether to release Medicare cost reports are exempt from judicial review. Since the opinion below rests on questionable assumptions, FAH asserts that such decision should be reversed and that submitters of confidential data in Medicare cost reports are entitled to a trial *de novo* on the question of whether confidential business information should be disclosed publicly.

V.

Argument.

A. Medicare Cost Reports Contain Confidential Financial Information as Defined by Exemption 4 of the Freedom of Information Act.

Release of Medicare cost reports is one of the most controversial of FOIA requests. Amicus is aware of at least twenty-three reverse FOIA cases brought to enjoin their disclosure.[3] Each court which reached a decision held that cost reports contain confidential financial information, release of which is prohibited by Exemption 4 of the FOIA, 18 U.S.C. § 1905, or both.[4] Amicus is aware of no trial court which has permitted the release of a cost report.

The cost report contains a detailed breakdown and analysis of the provider's costs and receipts for the fiscal year, and is significantly more detailed than either a federal income tax return or documents filed with the Securities and Exchange Commission. *Hospital Affiliates International, Inc. v. Califano,* No. 77-C-3088, slip op. at 10 (N.D. Ill. Jan. 30, 1978).[5] Its release would supply a competitor with a virtual financial blueprint of the hospital. *Circle Terrace Hospital Corp. v. Group Hospitalization, Inc.,* No. 77-487-A, slip op. at 1 (E.D.Va. Sept. 6, 1977).[6] A competitor could determine with precision the extent of the provider's profitability and the exact method, by department, which the hospital uses to maintain its profitability.

[3]A list of Medicare reverse FOIA cases is attached as Appendix A.

[4]Such holdings were by way of preliminary injunctions, permanent injunctions, or both.

[5]A copy of the decision is attached as Appendix B.

[6]A copy of the decision is attached as Appendix C.

Moreover, release would also have serious anticompetitive and cost-increasing effects. For example, according to the court in *Hospital Affiliates* disclosure of the hospital's wage structure would aggravate industry-wide wage inflation and disclosure of the cost of contracted services would diminish the availability and benefits of competitive bidding.[7]

In general, release of this confidential information would seriously undermine the ability of a hospital to maintain its profitability and competitive position. Accordingly, "once the cost report is released, ... the injury . . . will be complete and irreparable." *Westchester General Hospital,* 434 F. Supp. at 437.

B. Agency Review of Decisions to Release Cost Reports Is Inadequate.

In its decision below, the court of appeals held that judicial review of a determination to release confidential financial information is limited to review of the agency record pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"). According to the court, in reviewing an agency decision to release information covered by Exemption 4,

> the court must undertake a two-step analysis. It must first examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions and, if so, then examine whether the agency considered the proper factors

[7]For a more detailed enumeration of the adverse effects of release of cost reports, *see Hospital Affiliates International v. Califano,* No. 77-C-3088, slip op. at 11-15 (N.D. Ill. Jan. 30, 1978) and *Westchester General Hospital, Inc. v. Department of Health, Education and Welfare,* 434 F. Supp. 435, 437-38 (M.D. Fla. 1977).

in determining that disclosure was permitted under its own disclosure regulations.

565 F.2d at 1192.

The opinion below is based on the premise that the agency will evaluate the specific request and apply certain standards before releasing the information. Court review would be limited to determining whether the agency correctly measured relevant factors against the proper standards.

With respect to release of Medicare cost reports, however, there is no meaningful agency review. Medicare regulations provide that cost reports submitted by providers "*shall* be made available to the public . . . [u]pon request in writing." 42 C.F.R. 422.435. (Emphasis added.) One would expect the agency to follow routinely its own mandatory regulation and release all requested cost reports. Contrary to the assumption underlying the opinion below, the decision to release all cost reports has already been made and agency review is therefore merely perfunctory. The criterion stated by the court below, *i.e.*, whether the agency considered the proper factors in applying its own disclosure regulation, has by definition been met; the regulation requires the disclosure. Further inquiry is therefore obviated. Since there is no actual agency review and thus no record, there is also nothing for a court to review. For these reasons, judicial review of the Medicare Bureau's decision to release confidential cost reports cannot meaningfully be made pursuant to APA procedures.

The problem is exacerbated by the fact that in many instances it is not the Medicare Bureau which releases cost reports under FOIA requests. Rather, they

are often released by the fiscal intermediaries, private insurance companies under contract with the government performing audit and payment services pursuant to Section 1816 of the Social Security Act, 42 U.S.C. § 1395h. Thus, without an implied cause of action under the FOIA or Section 1905, hospitals would be precluded from challenging not only agency determinations but decisions of private companies to release confidential cost reports.

C. Court Review of Agency Decisions to Release Cost Reports is Unavailable.

Assuming that Medicare providers could obtain a meaningful review of the problems involved in releasing cost reports at the agency level, court review of the agency's decision may well be unavailable. According to the government, judicial review of such determinations is precluded by Title XVIII of the Social Security Act (the "Medicare Act").

Congress, in enacting the Medicare Act, incorporated sections of Title II of the Social Security Act limiting judicial review of the Secretary's determinations. Section 1872 of the Social Security Act, 42 U.S.C. § 1395ii. Under Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a), the Secretary is authorized to adopt regulations necessary to carry out the provisions of the law. Section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), as incorporated into the Medicare Act by 42 U.S.C. § 1395ii, provides that:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who are parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the

United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

This Court, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), concluded that Section 405(h) precludes federal question jurisdiction under 28 U.S.C. § 1331, with certain limited exceptions. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court also eliminated the APA as an independent basis of federal court jurisdiction. Thus the jurisdictional limits imposed by Section 405(h) may preclude review of agency decisions to release cost reports under 28 U.S.C. § 1331 and the APA.

In applying Section 405(h) some courts read the section as an absolute bar to any review of agency decisions except as specifically provided for in Title XVIII. For example, in *Medical Center of Independence v. Califano*, 433 F. Supp. 837 (W.D. Mo. 1977), the court cited *Salfi* and applied the case to Title XVIII claims:

> "That the third sentence of § 405(h) is more than a codified requirement of administrative exhaustion is plain from its own language which states that *no* action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted. 422 U.S. at 756, 95 S.Ct. at 2463. [Emphasis in original]"
>
> Although the claim in *Salfi* arose under Title II of the Social Security Act—and involved a challenge to limitations placed on benefit payments to widows and children of deceased individuals

> covered under the Act—the result reached in *Salfi* clearly applies to the Medicare provisions found in Title XVIII of the Act.

433 F. Supp. at 841 citing *Salfi* at 756. Other decisions precluding court review of the Secretary's decisions under Medicare include *Association of American Medical Colleges v. Califano*, 569 F.2d 101 (D.C. Cir. 1977); *St. Louis Univ. v. Blue Cross Hosp. Serv.*, 537 F.2d 283 (8th Cir. 1976) *cert. denied* 429 U.S. 977 (1976); *South Windsor Convalescent Home, Inc. v. Mathews*, 541 F.2d 910 (2d Cir. 1976); *Chelsea Community Hospital v. Michigan Blue Cross*, 436 F. Supp. 1050 (E.D. Mich. 1977).[8]

The court below determined that neither the FOIA nor 18 U.S.C. § 1905 created a cause of action in submitters of confidential business information to prevent disclosure. 565 F.2d at 1185, 1188. If courts apply *Salfi* and *Sanders* to reverse FOIA Medicare disputes and the decision of the court below is upheld, hospitals will be absolutely barred from challenging agency decisions to release confidential cost reports. Thus, contrary to the conclusion of the court below, judicial review of decisions to release Medicare cost reports may be totally foreclosed.

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[8]This Court has upheld other jurisdictional limitations on judicial review. *See, e.g., Fein v. Selective Service System Local Board No. 7, Yonkers, N.Y.*, 405 U.S. 365 (1972) (statute barring judicial review of selective service classifications except in limited circumstances upheld); *Harmon v. Bruckner*, 355 U.S. 579 (1958) (statute making decision of Army Discharge Review Board final and subject only to review by the Secretary of the Army upheld); *U.S. v. California Eastern Line*, 348 U.S. 351 (1955) (provision of Renegotiation Act making non-reviewable determinations of excess profits by Tax Court upheld); *U.S. v. Wunderlich*, 342 U.S. 98 (1951) (provision in government contract specifying review is limited to head of department upheld absent fraud).

VI.

Conclusion.

In reaching its conclusion, the court of appeals assumed (1) that there would be an agency determination before confidential information is released, and (2) that a court would be able to review the administrative record to determine whether there was an abuse of discretion. With respect to the release of Medicare cost reports (the question involved in a large number of reverse FOIA cases), neither premise is valid. Agency review is foreclosed by HEW's own regulation, and court review may be foreclosed by 42 U.S.C. § 405(h). Without an implied cause of action under the FOIA or Section 1905, hospitals would be precluded from either meaningful agency review or judicial review to challenge the release of confidential cost reports. For these reasons, amicus urges the Court to reverse the decision below and find that submitters of confidential data are entitled to a trial *de novo* to prevent the government's disclosure of such information to third parties.

Respectfully submitted,

WEISSBURG AND ARONSON, INC.,
By ROBERT A. KLEIN,
DAVID REPLOGLE,
Attorneys for the Federation of American Hospitals.

APPENDIX A.

1. *AID, Inc. v. Califano*, No. 4-78-915 (S.D. Tex.).
2. *Appolo Medical Center, Inc. v. Department of Health, Education and Welfare*, No. 77-671-Civ-J-S (M.D. Fla.)
3. *Circle Terrace Hospital v. Group Hospitalization, Inc.*, No. 77-487-A (E.D. Va., Sept. 6, 1977).
4. *The Diplomat Lakewood, Inc. d.b.a. The Aristocrat Nursing Home—Lakewood v. Blue Cross of Northeast Ohio*, No. C77-718, (N.D. Ohio, Nov. 25, 1977). appeal pending.
5. *Doctors Hosp. of Hollywood v. Department of Health, Education & Welfare*, No. 77-420-Civ-J-S (M.D. Fla.)
6. *Florida Medical Center, Inc. v. Department of Health, Education and Welfare*, No. 77-965-Civ.-J-S, (M.D. Fla. Feb. 3, 1978).
7. *Hospital Affiliates International, Inc. v. Califano*, No. 77 C 3088 (N.D. Ill. Jan. 30, 1978).
8. *Hospital Affiliates International, Inc. v. Califano*, No. 78-226-Civ-J-S. (M.D. Fla. May 31, 1978).
9. *Hospital Development & Service Corp. v. Department of Health, Education and Welfare*, No. 77-966-Civ.-J-S. (M.D. Fla. Feb. 3, 1978).
10. *Humana of Florida, Inc. v. Department of Health, Education and Welfare*, No. 78-72-Civ-J-S, (M.D. Fla. Mar. 22, 1978).
11. *Humana of Virginia, Inc. v. Blue Cross of Virginia*, No. 77-0588-R (E.D. Va. Oct. 13, 1977).
12. *John F. Kennedy Memorial Hospital, Inc. v. Department of Health, Education and Welfare*, No. 78-54-Civ-J-S. (M.D. Fla.)

13. *Laughlin Memorial Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* C.A. No. 1-77-318, (E.D. Tenn. Jan. 18, 1978).

14. *McCoy v. Weinberger,* 386 F. Supp. 504 (W.D. Ky. 1974).

15. *Medenco, Inc. v. Califano,* No. H-78-731, (S.D. Tex. Ap. 19, 1978).

16. *Medfield Corp. v. Califano,* No. 76-625-Civ-J-S (M.D. Fla.).

17. *North Florida Regional Hospital v. Mutual of Omaha Ins. Co.,* No. C-77-1808-A, (N.D.Ga. Mar. 31, 1978), appeal pending.

18. *Palm Beach Gardens Community Hospital v. Califano,* No. 76-624-Civ-J-S (M.D. Fla.).

19. *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* 430 F. Supp. 1093 (E.D Tenn. 1977) appeal pending.

20. *Redi-Care, Inc. v. Department of Health, Education and Welfare,* No. 78-99-Civ-J-S. (M.D. Fla.).

21. *Psychiatric Institute of Washington, D.C., Inc. v. Group Hospitalization, Inc.,* Medicare & Medicaid Guide (CCH ¶ 28,909 (D.D.C. 1978).

22. *St. Mary's Hospital, Inc. v. Califano,* No. 78-801-Civ-CF, (S.D. Fla. Jan. 19, 1978).

23. *Westchester General Hospital v. Department of Health, Education and Welfare,* 434 F. Supp. 435 (M.D. Fla. 1977).

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the United States District Court, for the Northern District of Illinois, Eastern Division.

Hospital Affiliates International Inc., a Delaware Corporation, and Affiliated Midwest Hospitals, Inc., a Delaware Corporation d/b/a Chicago Lakeshore Hospital and Riveredge Hospital, Plaintiffs v. Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, and Blue Cross Association, and Health Care Service Corporation, Illinois Not-for-Profit Corporations, Defendants. No. 77 C 3088.

The Court having examined various affidavits submitted by the parties, certain documents submitted by the defendants for *in camera* inspection, memoranda of law submitted by the parties, and proposed Findings of Fact and Conclusions of Law submitted by Plaintiffs in support of the grant of Plaintiffs' Motion for a Preliminary Injunction finds:

I
Preliminary Procedural Statement

1.1 Plaintiffs filed this Action on August 19, 1977, seeking preliminary and permanent injunctive relief against the threatened disclosure of certain Medicare cost reports ("the Cost Reports") and the information contained in those documents for any purpose not inextricably tied to the Medicare program. On August 22, 1977, Plaintiffs moved for a Temporary Restraining Order, supported by Affidavits dated August 19, 1977, from Albert J. Gale, Administrator for Riveredge Hospital ("Riveredge") and Jeffrey L. Webster, Controller

for Chicago Lakeshore Hospital ("Lakeshore") verifying Plaintiffs' Complaint, and by the Affidavits of Robert J. Toller, Plaintiffs' Manager of reimbursements, dated August 19, 1977. In opposition to Plaintiffs' Motion for a Temporary Restraining Order, Defendant Health Care Service Corporation ("HCSC") filed an Affidavit from R. Jack Chase, Administrator —Blue Cross Contracts, dated August 23, 1977.

1.2 On August 24, 1977, Plaintiffs' Motion for a Temporary Restraining Order was granted by Judge Joel M. Flaum, restraining Defendants from disclosing Plaintiffs' Cost Reports and the information contained in them pending a ruling on Plaintiffs' Motion for Preliminary Injunction. Thereafter, the parties have agreed to the continuation of the Temporary Restraining Order until a ruling on the pending motion could be made by the Court.

1.3 Pursuant to the Court's request, on November 14, 1977, Defendants provided the Court with copies of the Cost Reports for *in camera* review.

1.4 Plaintiffs have submitted additional Affidavits of Robert J. Toller, dated August 31, 1977, and November 23, 1977, as well as an Affidavit from an independent accounting expert, Allan J. Winnick, a partner in Arthur Andersen & Company, dated November 23, 1977, in support of the Motion for a Preliminary Injunction. Defendants have not submitted any further affidavits or other evidentiary support for their Opposition to Plaintiffs' Motion.

WHEREFORE, on the basis of the various affidavits and other evidence submitted by the parties, including the Court's *in camera* review of the Cost Reports, and after considering the arguments and authorities

advanced in the Memoranda of Law submitted by the parties, the Court reaches the following Findings of Fact and Conclusions of Law:

II

Findings of Fact

2.1 *Identification of Parties*

(a) Affiliates is a Delaware corporation, having its principal place of business in Nashville, Tennessee, and is an investor-owned corporation whose stock is listed on the New York Stock Exchange. Affiliates has been and is engaged in the business of holding stock in various corporations engaged in health care delivery and management.

(b) Midwest is a Delaware corporation, having its principal place of business in Chicago, Illinois, and is a wholly-owned subsidiary of Affiliates. Midwest has been and is engaged in the business of owning and operating hospitals, and does business as Lakeshore and Riveredge.

(c) Defendant Joseph A. Califano, Jr., Secretary of Health, Education and Welfare ("the Secretary"), is the federal officer responsible for (a) the administration of the Social Security Act, including Title XVIII of the Act, 42 U.S.C. §§1395-1395qq ("the Medicare program"), and (b) the actions of parties acting as government agents or agencies under the Act.

(d) Blue Cross Association ("BCA"), is a not-for-profit Illinois Corporation, having its principal place of business in Chicago, Illinois. BCA is a "fiscal intermediary" in the administration of the Medicare program under Section 1816 of the Social Security Act (42 U.S.C. §1395h). As such, BCA acts as an agent of

Defendant Secretary and the Government of the United States in making payment to providers of hospital services, including Lakeshore and Riveredge, for covered services furnished to Medicare beneficiaries, and BCA has the power to delegate its fiscal intermediary duties to local and regional Blue Cross Plans.

(e) Health Care Service Corporation ("HCSC"), is an Iilinois not-for-profit corporation, having its principal place of business in Chicago, Illinois, and is a non-governmetnal organization offering private health insurance programs to the public.

2.2 *Facts Underlying Plaintiffs' Claim.*

(a) Lakeshore and Riveredge are "providers" of hospital services to Medicare beneficiaries as that term is defined in 42 U.S.C. §1395cc. They receive payment directly from Social Security trust funds for covered services furnished to Medicare beneficiaries. The amount of that payment is the portion of their total costs allocable to Medicare patients. Like all other providers, in order to determine total cost and the portion allocable to Medicare beneficiaries, Lakeshore and Riveredge, file annual Mediare cost reports ("the Cost Reports"). 20 C.F.R. § 405.406. The Cost Reports are submitted on forms prescribed by Defendants and include a detailed breakdown and departmental allocation of costs and revenues of Lakeshore and Riveredge.

(b) The Secretary has contracted with BCA to review and audit provider cost reports and to determine the Medicare reimbursement owing to providers. In carrying out its assigned functions, BCA has, in turn, delegated a portion of its fiscal intermediary duties to HCSC as local representative of BCA. BCA and HCSC have acquired and maintain possession of the

Cost Reports filed by providers, including Lakeshore and Riveredge.

(c) BCA and HCSC also issue and keep copies of "Notices of Program Reimbursement" ("NPR's") which inform providers of the amount of Medicare reimbursement calculated to have been payable to a provider for a cost reporting period. Neither the Cost Reports nor the NPR's of Lakeshore and Riveredge are presently available except as needed by Defendants' agents and employees for purposes of administering the Medicare program. Nor is much of the information contained in those documents otherwise available.

(d) On or about August 10, 1977, BCA and HSCS formally notified Lakeshore and Riveredge of their intent to disclose the information contained in those hospitals' Cost Reports for the fiscal year ended December 31, 1976, to R. Jack Chase, the Administrator of HCSC's Blue Cross Reimbursment Department, the department of HCSC responsible for auditing and reimbursing member hospitals under HCSC's private insurance programs. No provision was made (1) to protect the confidentiality of the trade secrets, financial data and commercial information contained in the Cost Reports and NPR's, (2) to restrict the use of the information contained therein, or (3) to protect Plaintiffs' competitive position.

2.3 *The Plaintiffs' Medical Cost Reports.*

(a) Disclosure of the Cost Reports would, upon analysis by the recipient, reveal confidential commercial and financial information including without limitation:

(1) information, which could be employed to calculate average hourly rates of employees (Supplemental

affidavit of Robert J. Toller, November 23, 1977, [hereinafter "Toller III"] at 3);

(2) payment rates made for certain contract services such as laundry and linen contracts (Toller III at 4);

(3) compensation levels of hospital-based physicians (Toller III at 5, Affidavit of Robert J. Toller, August 31, 1977 [hereinafter "Toller II"] at 3);

(4) statistics used for cost allocation purposes (e.g. space allocations of the various operating departments within the hospitals) (Toller III at 6);

(5) information useful in determining the average charge per unit of patient service within the various departments (Toller III at 7);

(6) reimbursement amounts for providing services to Medicare patients, potentially reflecting discounts or contractual adjustments granted to Medicare (Toller III at 7, Toller II at 4);

(7) detailed information relative to the charges and cost of providing services to patients (Toller III at 8);

(8) detailed information related to working capital and total assets employed by the hospitals in the provision of patient care services (Toller III at 9);

(9) expenses of each department, identified as to salary and non-salary costs (Toller II at 3);

(10) costs and revenues by patient service departments (Toller II at 4);

(11) bed capacity by type of service, the patient utilization of the beds identified as to Medicare and non-Medicare patients, as well as the percent of bed capacity utilized (Toller II at 5);

(12) costs of the hospitals' facilities and equipment, including acquisitions and disposals during the year (Toller II at 5);

(13) detailed financial position and operating results of each hospital (Toller II at 6);

(14) costs of support services provided by or to affiliated companies (Toller II at 6); and

(15) department costs and allocations of support services' departmental costs to patient service departments. (Toller II at 7)

(b) The Cost Reports contain financial information in a manner which is more detailed and goes into greater depth than typical financial statements of a hospital, the tax return of a proprietary hospital, or the filings of a hospital subject to the filing requirements of the Securities and Exchange Commission. (Affidavit of Allan J. Winick, November 23, 1977, at 2) The information, both of its own and in combination with other, already available information, reflects management technique, philosophy and policy which has been developed through years of experience, as well as substantial financial investments by Plaintiffs. This information could be used to the serious disadvantage and the substantial harm of the Plaintiffs, by placing the Plaintiffs at a competitive disadvantage with respect to competing hospitals, contractors dealing with the hospitals, and customers using the hospital services. Finally, the release of the cost report information would, in some cases, constitute an invasion of certain individuals' right to privacy. (Toller II at 4)

(c) the following list provides examples of some potential, competitively harmful uses that may be made of the information contained in the Cost Reports:

(1) Disclosure of the expenses of each department identified as to salary and non-salary costs, and certain information, on the aggregate, needed to calculate average hourly rates of employees in the hospitals could result in severe wage rate competition, which could have the effect of increasing costs within the hospitals and potentially within other hospitals in the area by (i) by causing hospital-wide wage rate adjustments, and (ii) increasing employee turnover. (Toller III at 3, Toller II at 2)

(2) Disclosure of the cost of contracted services to potential suppliers of these services could have the effect of substantially negating the benefit of competitive bidding and would have the effect of increasing cost to the hospitals, or at least limiting the reduction in cost to a point above which it would have been without disclosure of the Cost Reports. (Toller III at 4, Toller II at 3)

(3) Disclosure of the hospital-based physicians components of compensation related to patient care could have a similar anti-competitive and cost-increasing effect. Physicians can reasonably be expected to seek competitive compensation levels as measured by payments being made both within the hospitals and in competitive hospitals for similar services. Competing hospitals could use such information to attract physicians away from the hospitals which would necessitate, other things being equal, the hospitals paying higher compensation levels to replace physicians lured away by competing hospitals. Such information is normally a matter of confidentiality between the hospitals and the physicians and would constitute an invasion of privacy. (Toller III at 5, Toller II at 3)

(4) Disclosure of space allocations of the various operating departments within the hospitals, in conjunction with statistics reflecting revenues by departments, could indicate which departments are expanding or contracting their services. To the extent that this information causes or induces competitors to expand services concurrently with the hospitals, duplication of services would occur which would tend to increase costs. (Toller III at 6)

(5) Disclosure of the costs and revenues by patient service departments and the information necessary to calculate the average charge per unit of patient service within ancillary departments would give competing hospitals the ability to compare charge levels for similar services, which could tend to increase the over-all cost of hospital care in the area due to increased charges for services. (Toller III at 7, Toller II at 4)

(6) Disclosure of the reimbursement amounts for providing services to Medicare patients reflects the "discounts" or contractual adjustments granted to Medicare which would give other major third party payors the ability to negotiate a similar discount for their policy holders, thus resulting in a redistribution of the cost of providing hospital care. (Toller III at 7, Toller II at 4)

(7) Disclosure of the bed capacity by type of service, the patient utilization of these beds identified as to Medicare and non-Medicare patients, and the percent of bed capacity utilized, together with other financial and statistical data included within the cost report, provides insight into the earnings potential and limitations of Affiliates, which can be misleading when considered by itself and could be used to influence the trading price of Plaintiff Affiliates' stock to the disad-

vantage of actual or potential stockholders not having access to such information. (Toller II at 5)

(8) Disclosure of the cost of the hospitals' facilities and equipment, including annual acquisitions and disposals, can provide a complete history of the hospital faciliteis which can provide trend information concerning expansion or contraction of certain services. Such information could be used to the detriment of the hospitals in seeking Certificate of Need approvals. The information could also be used by persons interested in acquiring Plaintiff Affiliates to the disadvantage of uninformed stockholders. (Toller II at 5)

(9) Disclosure of the detailed financial position and operating results of each particular hospital would result in a competitive disadvantage to Affiliates, as such information is not required from similar companies by the Securities and Exchange Commission. (Toller II at 6)

(10) Disclosure of the cost of support services provided to affiliated companies would restrict Affiliates' ability to makret its management consulting services capability by detrimentally affecting its pricing negotiations. (Toller II at 6)

(11) Disclosure of the departmental costs and the allocation of support services' departments costs to patients service departments, taken together with other information available on the cost reports, could enable a knowledgeable prospective management service customer to adopt Affiliates' management techniques without using its management services. A prospective management client wishing to so act would observe, among other items (i) department costs, for comparison purposes, (ii) distribution of housekeeping services, (iii) full time employee count and staffing patterns, (iv)

space allocation, and (v) trend factors highlighting expansion or contraction or various services and departments. (Toller II at 7)

(d) The release of the confidential commercial and financial information contained in the Cost Reports would cause substantial harm to the competitive positions of Affiliated and Midwest. The threatened harm would be irreparable to the business methods and interests of the Plaintiffs, and monetary damages would be neither ascertainable, nor adequate as a remedy.

III
Conclusions of Law

3.1 *Jurisdiction and Standing.*

(a) The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331, as this action arises under the Constitution and laws of the United States, and is brought against an officer of the United States in his official capacity. *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190 (4th Circ. 1976), *cert. denied*, 45 U.S.L.W. 3754 (U.S. May 12, 1977); *Planning Research Corp. v. Federal Power Commission*, 555 F.2d 970, 977 (D.C. Cir. 1977). Court also has jurisdiction over the subject matter pursuant to 5 U.S.C. §522 [The Freedom of Information Act], as this action is brought to enforce the confidentiality of information exempted from disclosure under Section 552, and Defendants BCA and HCSC are parties acting as government agents or agencies. *Id.*

(b) Plaintiffs have the requisite standing to bring this action as they have shown that (i) they are within the zone of interest to be protected by 5 U.S.C. §552 (b)(4), 20 C.F.R. §401.3 and 18 U.S.C. §1905, and

42 U.S.C. §1306, (ii) they have the requisite concrete stake in the outcome of the suit which sharpens the presentation of issues, and (iii) the issue presented is capable of judicial resolution.

3.2 *Plaintiffs Have Shown a Sufficient Likelihood of Success on the Merits to Warrant a Preliminary Injunction.*

(a) An implied right of nondisclosure exists in connection with exemption (b)(4) to the Freedom of Information Act (5 U.S.C.(b)(4)). Under the Freedom of Information Act ("FOIA") (5 U.S.C. §552), information which falls within an exemption, is not subject to mandatory disclosure. 5 U.S.C. §552(b)(4) exempts from the scope of the FOIA matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information is "confidential" within the meaning of 5 U.S.C. §552(b)(4) if disclosure would either (i) impair the Government's ability to obtain necessary information in the future, or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Association v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974). Plaintiffs' Cost Reports and NPR's Contain trade secrets and confidential financial and commercial information within the scope of exemption (b)(4) to the FOIA (5 U.S.C. § 552(b)(4)). *Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee,* No. CIV-1-77-85 (E.D. Tenn. April 15, 1977); *Westchester General Hospital, Inc. v. Dep't of H.E.W.,* No. 77-364-Civ-J-T (S.C. Fla. June 27, 1977). An implied right of nondisclosure exists on behalf of suppliers of information, based upon the carefully delineated exemptions

to the FOIA, *Westinghouse Electric Corp. v. Schlesinger,* 542 F.2d 1190 (4th Cir. 1976) *cert. denied sub non., Brown v. Westinghouse Electric Corp.,* 97 S.Ct. 2199 (1977). Accordingly, Plaintiffs'-Cost Reports and NPR's are protected from disclosure pursuant to the right of non-disclosure implied from 5 U.S.C. §552(b)(4). *Id.*

(b) There is a reasonable probability that disclosure of Plaintiffs' Cost Reports and NPR's may be prohibited by 18 U.S.C. §1905 and 42 U.S.C. §1306. 18 U.S.C. §1905 makes it a crime for any employee of the government or any agency of the government to divulge or disclose information concerning trade secrets, operations or confidential statistical data not authorized by law. Plaintiffs' Cost Reports and NPR's were filed with Defendants pursuant to 42 U.S.C. §1395(g) and 20 C.F.R. §406, and contain information within the scope of 18 U.S.C. §1905. Likewise, 42 U.S.C. §1306(a) prohibits, under criminal penalties, the disclosure of such information obtained by the Secretary, except as prescribed by regulation. The only law or regulation purporting to authorize the disclosure of the Cost Reports and NPR's is 20 C.F.R. §422.435.

(c) Application of 20 C.F.R. §422.435 to permit disclosure of Plaintiffs' Cost Reports and NPR's is in excess of statutory authority, and the regulation, as applied, is invalid. (5 U.S.C. §706) The promulgation of the regulation purportedly relied upon the authority granted by the FOIA, not the provision of 42 U.S.C. §1306. (20 C.F.R. §422.401) The FOIA does not apply to information coming within an exemption to the disclosure requirements, and the regulation cannot be supported by additional, *post hoc,* asserted statutory authorization. *Burlington Truck Lines v. Uni-*

ted States, 371 U.S. 156, 158, 83 S. Ct. 239 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454 (1943). Moreover, Defendants have not shown that 42 U.S.C. §1306 can be construed to provide authority for promulgation of 20 C.F.R. §422.435.

(d) The threatened disclosure of the Cost Reports and NPR's pursuant to 20 C.F.R. §422.435 may constitute an abuse of agency discretion. (5 U.S.C. §706) There is a reasonable probability that the Cost Reports and NPR's contain information within the scope of 18 U.S.C. §1905. 20 C.F.R. §422.435 purporting to authorize the disclosure of the Cost reports and NPR's, may therefore be invalid as a *per se* abuse of discretion, as the regulation would be in direct contravention of 18 U.S.C. §1905. *Charles River Park "A", Inc. v. Dep't of H.U.D.*, 519 F.2d 935, 943 (D.C. Cir. 1975) Moreover, assuming *arguendo* that 18 U.S.C. §1905 does not apply to this case, Plaintiffs' interests in preserving the confidentiality of their trade secrets and financial and commercial information in order to prevent substantial harm to their competitive positions outweigh the governmental and public interests in disclosure of the requested information. *Charles River Park "A", Inc. v. Dep't of H.U.D., supra; Eq.; Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, supra,* and *Westchester General Hospital Inc. v. Dep't of H.E.W., supra.*

(e) 20 C.F.R. §422.435 is inconsistent with regulations the Secretary has designated as controlling and is invalid. The regulations prescribed by the Secretary concerning the availability and disclosure of information are found at 20 C.F.R. §401.3 and 20 C.F.R. §422.401 *et seq.* As expressly stated, the regulations set forth in 20 C.F.R. §422.401, *et seq.* including 20 C.F.R.

§422.435, were not intended to "revoke, modify or supercede the regulations of the Social Security Administration relating to disclosure of information" set forth in Part 401 of Title 20. Those regulations, in turn, contemplate the protection of confidential information, and 20 C.F.R. §401.3, now in effect does not contemplate disclosure where such action would be prohibited by statute or where disclosure is not in the public interest and "consistent with obligations of confidentiality and administrative necessity" recognized by the Act. (20 C.F.R. §401.3(b)(2); See 45 C.F.R. §§5.11, 5.12, 5.70 and 5.71) The threatened disclosure of Plaintiffs' Cost Reports and NPR's pursuant to 20 C.F.R. §422.435 is inconsistent with the Secretary's recognized obligations of confidentiality and administrative necessity. Therefore, 20 C.F.R. §422.435 is inconsistent with the terms of controlling regulations and is invalid and without the force and effect of law.

3.3 *Plaintiffs Have Shown a Likelihood of Irreparable Harm to Plaintiffs Which Outweighs Any Potential Harm to Defendants.*

(a) The information which is either explicitly stated in or deducible from Plaintiffs' Cost Reports and NPR's would, if obtained by a competitor, facilitate personnel raiding, takeover efforts, unfair bargaining practices, selective pricing of patient services, and expansion planning. Disclosure of the requested information would cause substantial harm to Plaintiffs' competitive position. *Parkridge Hospital Inc. v. Blue Cross and Blue Shield of Tennessee, et al.; supra, McCoy v. Weinberger,* 386 F.Supp. 504, 507 (W.D. Ky. 1974).

(b) The confidential commercial and financial nature of the documents sought to be released establishes

the irreparable harm which will result. Once these confidential reports are released, they may never be recalled, and they will have become a part of the public domain available to anyone wishing to know about Plaintiffs' business operations or other confidential aspects of Plaintiffs' business activity. *Westchester General Hospital, Inc. v. Dep't. of H.E.W., supra.*

(c) There does not appear to be any threatened harm to Defendants from the grant of injunctive relief to protect the confidentiality of Plaintiffs' Cost Reports and NPR's.

3.4 *Plaintiffs Have Shown that They are Without Adequate Remedy at Law.* Money damages do not appear to be an adequate remedy. The nature and degree of harm that would be done to Plaintiffs' competitive position in the relevant market by disclosure of information pertaining to their operations is immeasurable and therefore incompensable. Since Plaintiffs could neither be restored to the status quo existing before such disclosure, nor adequately compensated, the substantial harm that they would suffer from disclosure of the confidential data would be irreparable. *Id.*

3.5 *Injunctive Relief Is Not Against The Public Interest.*

(a) The public interest in full disclosure and free access to information collected by the government is not unlimited, and the protection of highly confidential information is recognized by common law, statute and the Secretary's own regulations. Preservation of the confidentiality of information entrusted to the government is also essential to the operation of the governmental programs administered by the Secretary. Injunctive relief in this case serves those interests without

impairing any substantial public interest in access to information.

(b) The public interest is also served by preventing the disclosure of information where such disclosure could have anti-competitive effects, deter innovative business techniques in hospital management, as well as participation in governmental programs, such as Medicare, and possibly contribute to further increased costs of medical care delivery.

3.6 *Plaintiffs Are Entitled to Preliminary Injunction.* Accordingly, a preliminary injunction is hereby issued enjoining the Defendants and each of them and their officers, agents, attorneys, representatives and members and all persons acting in and or in conjunction therewith from making Plaintiffs' Cost Reports and NPR's available to Defendant HCSC's Blue Cross Reimbursement Department or to any other person or corporation for any purpose not inextricably tied to the Medicare Program pending determination of Plaintiffs' request for permanent injunction.

ENTERED:

/s/ (Illegible)
United States District Judge

DATED: January 30, 1978.

APPENDIX C.

Order.

In the United States District Court, for the Eastern District of Virginia, Alexandria Division.

Circle Terrace Hospital Corporation, Plaintiff v. Group Hospitalization, Inc., et al., Defendants. Civil Action No. 77-487-A.

The question before the Court in this case is whether certain reports submitted by Circle Terrace to the defendants fall within the (b)(4) exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

The plaintiff claims these reports contain privileged and/or confidential commercial or financial information —That there is keen competition between hospitals in the Northern Virginia-District of Columbia area over patients, physicians and professional employees and that the information contained in these reports is virtually a financial blueprint of Circle Terrace and is much more detailed than its tax returns.

The Government admits that it gives these reports to anybody who asks for them.

Although neither side elected to call any outside expert as was done in the Westinghouse, General Motors and U. S. Steel cases, it is rather clear from an examination of the documents in question that much of the information therein contained would not be available to a competitor from other sources and would cause substantial harm to the competitive position of the person from whom the information was obtained.

The Court of Appeals for the Fourth Circuit, in Westinghouse v. Schlesinger, 542 F.2d 1190 (1976), sets forth the law in this circuit as follows:

> ". . . The protection from disclosure from such information by Exemption 4 [was granted] . . . not only as a matter of fairness, but as a matter of right. . . . [The exemption] represented an express affirmation of a legislative policy favoring confidentiality of private information furnished government agencies, the disclosure of which might be harmful to private interests. It was manifestly intended to protect that private interest."

Therefore the Court finds that these cost reports fall within the § 552(b)(4) exemption and may not be disclosed to the general public by the Secretary. This is not to say, however, that the Secretary may not use the information contained in these reports in questioning or reporting the money that was paid to Circle Terrace for Medicare and/or Medicaid hospitalization, if he be so advised, and

It Is So Ordered.

The Clerk will send a copy of this order to all counsel of record.

September 6, 1977

/s/ ILLEGIBLE
United States Senior District Judge

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1978.